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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 579

UNION JOINT STOCK LAND BANK OF DETROIT,
Petitioner,

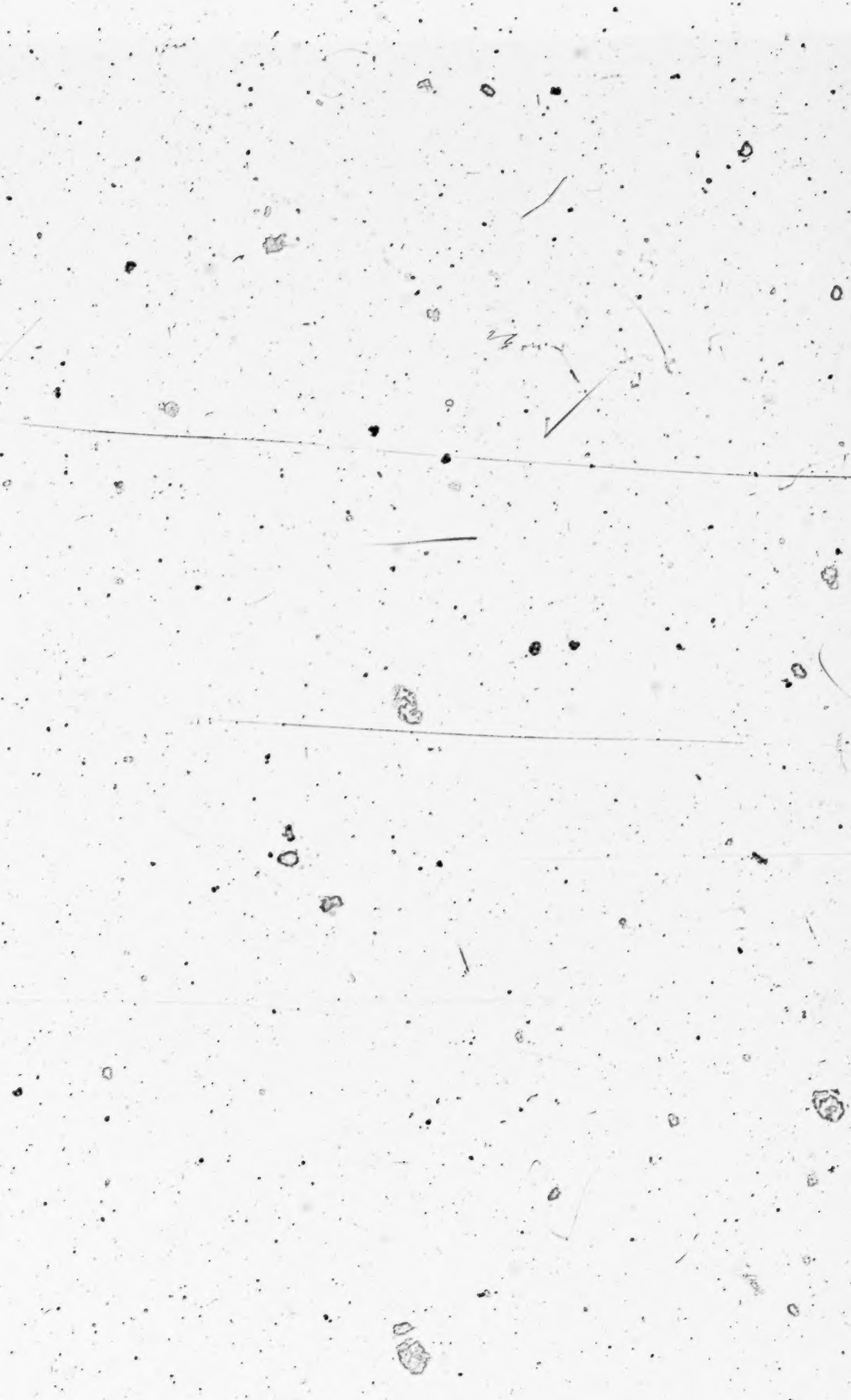
vs.

CARL BYERLY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 579

THE UNION JOINT STOCK LAND BANK OF DETROIT,
Petitioner and Appellee Below,

vs.

CARL BYERLY.
Respondent and Appellant Below.

No. 7854 IN THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The Union Joint Stock Land Bank of Detroit respectfully submits its petition for a writ of certiorari to review the judgment of the United States Cir-

cuit Court of Appeals for the Sixth Circuit in the above-entitled case.

The Circuit Court of Appeals for the Sixth Circuit has held a title to real estate in Ohio acquired by petitioners under judicial sale in State Court foreclosure proceedings to be void by its construction of Section 75 (a to r) of the Bankruptcy Act and has reversed the judgment of the District Court for the Southern District of Ohio, Eastern Division, sustaining the motion of the petitioner for an order of disclaimer of all right, title and interest in and to said real estate, consisting of a farm in Madison County, Ohio.

Summary Statement of Matter Involved

This cause concerns the proper construction and effect of Section 75 (a) to (r) of the Bankruptcy Act, 11 U. S. C. A., Sec. 203 (a) to (r), and its application to the facts of the record.

Petitioner was the mortgagee of the real estate involved, and respondent was the mortgagor. Foreclosure was instituted on September 1, 1932. A decree of foreclosure entered in the Common Pleas Court of Madison County, Ohio, and a sale was advertised for November 24, 1934.

On November 19, 1934, respondent filed his petition in the United States District Court under the provisions of Section 75 (a) to (r) of the Bankruptcy Act (R. 1). On the same day the District Court issued an order restraining further proceeding in foreclosure until further order of the court (R. 4).

On November 23, 1934, the District Court entered an order modifying the restraining order of November 19, 1934, to permit the sale of the premises as advertised but restraining any further proceedings, particularly confirmation, sale or transfer of any title or deed thereunder (R. 4).

On November 24, 1934, the Sheriff held the sale as advertised and in accordance with the above order of November 23, 1934.

On December 14, 1934, the petition of respondent was approved as properly filed and an order of reference was made to the Conciliation Commissioner.

On February 1, 1935, respondent abandoned (a) to (r) proceedings and filed his amended petition under Section 75 (s).

On August 26, 1935, the entire proceeding was dismissed by the District Court on application of the respondent, Byerly (R. 8).

On September 10, 1935, sale was confirmed by the Common Pleas Court of Madison County, Ohio (R. 25), which confirmation was thereafter affirmed by the Court of Appeals of said county.

On September 11, 1935, a deed was delivered by the Sheriff to the petitioner and on the same day it was recorded. Thereafter, petitioner went into possession of the premises and still retains possession.

On September 24, 1935, respondent moved the District Court for reinstatement of his case, which was granted (R. 9, 10, 11), but an amended petition has never been filed or an adjudication in bankruptcy entered.

On May 8, 1936, petitioner filed a motion in the District Court seeking an order of disclaimer of the real estate conveyed to it on September 11, 1935 (R. 12).

On October 22, 1936, an Order of Disclaimer was granted by the District Court (R. 18).

On September 18, 1939, Circuit Court of Appeals reversed District Court (R. 47, 48).

The present situation is that petitioner has title and possession of the property under decrees of the courts of Ohio, while the Circuit Court of Appeals has held the sale, confirmation and deed under the proceedings of said State

Courts void under its construction of Section 75 (a) to (r) of the Bankruptcy Act.

Jurisdiction

The jurisdiction of this Court is sought to be invoked under the provisions of Section 347 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347).

The judgment to be reviewed was entered by the Circuit Court of Appeals on September 18, 1939 (R. 47).

This petition was filed on December 9, 1939.

In view of the importance of the question with respect to proceedings instituted under Section 75 of the Bankruptcy Act and the meaning of an Act of Congress being involved, a writ of certiorari should be granted.

Adair v. *Bank of America Nat. Trust and Savings Ass'n*, 303 U. S. 350;

First Nat. Bank & Trust Co. v. *Beach*, 301 U. S. 435.

Questions Presented

I.

After the filing of a petition under Section 75 (a) to (r) of the Bankruptcy Act and after the issuance of a restraining order, restraining the Sheriff from holding an authorized sale in foreclosure until further order of the court, (R. 4), but prior to the approval of the petition and the order of reference by the court (R. 5) could a District Court in November, 1934, in its discretion, amend the restraining order to permit the Sheriff to conduct the sale, restraining, however, confirmation, transfer of title and delivery of deed (R. 4)?

II.

If an order is entered by a District Court amending a restraining order, as set forth in Question I and is acted

upon, not excepted to and not appealed from, is such order *res adjudicata* and binding upon the parties?

III.

Can a Sheriff's sale, held under circumstances stated in Question I, together with a decree of confirmation and deed, be held void by the Bankruptcy Court where the confirmation was entered by the State Court and deed delivered by the Sheriff while the State Court had jurisdiction of the parties and subject matter and after abandonment by debtor of proceedings under Section 75 (a) to (r) by resort to proceedings and adjudication under original Section 75 (s) and after dismissal of the bankruptcy proceedings upon application of the debtor and prior to the reinstatement thereof?

IV.

Can the decrees entered by the courts of the State of Ohio interpreting and applying the statutes of the State of Ohio, entered while such courts had sole and exclusive jurisdiction of the parties and the subject-matter be held void by a bankruptcy court subsequently acquiring jurisdiction of the parties?

V.

Has a Bankruptcy Court the power to hold void, in a collateral attack, the judgment of an Ohio court entered while said court had sole and exclusive jurisdiction of the parties and of the subject-matter, when the right to review said judgment has not been sought by direct attack in the Supreme Court of Ohio and in the Supreme Court of the United States?

Reasons Relied Upon for Allowance of Writ of Certiorari

1. Said Circuit Court of Appeals has decided important questions of Federal law, which have not been, but should be, settled by this Court.

2. Said Circuit Court of Appeals has decided an important question of local law in direct conflict with the decisions of the Court of Common Pleas, and the Court of Appeals of Madison County, Ohio, involving the same parties, subject-matter and issue, and has held the proceedings and decrees of said courts void.

3. Said Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court, to-wit:

Adair v. *Bank of America Nat. Trust and Savings Ass'n*, 303 U. S. 350;

Wright v. *Union Central Life Insurance Co.*, 304 U. S. 502.

4. The decision of said Circuit Court of Appeals is probably in conflict with a decision of the United States Circuit Court of Appeals for the Eighth Circuit, to-wit: *McWilliams* v. *Blackard*, 96 Fed. (2d) 43. Also decision of the United States Circuit Court of Appeals for the Seventh Circuit, to-wit: *Minneman* v. *Federal Land Bank of Louisville*, 105 Fed. (2d) 363.

5. Said Circuit Court of Appeals has attempted to void decrees of the Court of Common Pleas and the Court of Appeals of Madison County, Ohio, establishing the title of the petitioner to certain real estate in the State of Ohio, which decrees were entered at a time when said State Courts had sole jurisdiction of the parties and the subject-matter and when no bankruptcy proceeding was pending.

6. The decision of said Circuit Court of Appeals creates a cloud upon the title of petitioner to real estate in Ohio, which title was established by decrees of the Court of Common Pleas and the Court of Appeals of Madison County, Ohio, from which no appeal was taken. Said cloud cannot

be removed by any court other than the Supreme Court of the United States.

WHEREFORE, Your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals, Sixth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in the above-entitled cause, being numbered 7854 on its docket, to the end that this cause may be reviewed and determined by this Honorable Court, as provided for by Section 347, Title 28, U. S. C. A.; and that the judgment herein of said Circuit Court of Appeals be reversed by this Honorable Court; and for such further relief as this Court may deem proper.

THE UNION JOINT STOCK LAND BANK OF DETROIT;

A. G. MASTERS,

Counsel for Petitioner;

RALPH G. MARTIN,

Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 579

UNION JOINT STOCK LAND BANK OF DETROIT,
Petitioner,

vs.

CARL BYERLY.

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Opinions Below

The original opinion of the District Court was filed October 14, 1936, and is reported as *In re* Byerly, 20 Fed. Supp., page 762, 33 Am. B. R. (N. S.), 575 (R. 14). The order of the District Court was entered October 22, 1936 (R. 18).

The opinion of the District Court on the petition for rehearing was filed April 16, 1937 (R. 26). The order overruling the petition for rehearing was entered May 6, 1937 (R. 34).

The opinion of the Circuit Court of Appeals for the Sixth Circuit was filed September 18, 1939 (R. 48).

Jurisdiction

The jurisdiction of this Court is sought to be invoked under the provisions of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347a).

The judgment to be reviewed was entered by the Circuit Court of Appeals on September 18, 1939 (R. 47).

This petition was filed on December 9, 1939.

In view of the importance of the question with respect to proceedings instituted under Section 75 of the Bankruptcy Act and the meaning of an Act of Congress being involved, a writ of certiorari should be granted.

Adair v. *Bank of America Nat. Trust and Savings Ass'n*, 303 U. S. 350;

First Nat'l Bank & Trust Co. v. *Beach*, 301 U. S. 435.

Statement of the Case

A summary statement of the matters involved is found in the petition herein. The pertinent facts are as follows:

Carl Byerly, the respondent, was the owner of the farm involved and the Union Joint Lank Bank, petitioner, was the mortgagee. The mortgage was in default on September 1, 1932, and petitioner then filed a foreclosure suit in the Common Pleas Court of Madison County, Ohio. Judgment was rendered with a decree of foreclosure and the property was advertised to be sold by the Sheriff on November 24, 1934. On November 19, 1934, respondent filed his petition in the District Court under Section 75 (a) to (r) of the Bankruptcy Act (R. 1), and a restraining order was issued by the District Court, enjoining the Sheriff from further proceedings (R. 4). Upon application of the petitioner, the

District Court modified the restraining order permitting the Sheriff to proceed with the public sale as advertised, but prohibiting confirmation thereof, delivery of deed or passage of title (R. 4 and 5). The property was offered for sale by the Sheriff and petitioner was the highest bidder but the sale was not confirmed. On December 14, 1934, the petition of respondent was approved and the proceeding was referred to a conciliation commissioner (R. 5), and debtor's offer of composition made and rejected (R. 6). Respondent then filed his amended petition under Section 75 (s) of the Bankruptcy Act (R. [illegible]).

On August 26, 1935, upon application of Carl Byerly, respondent, the District Court dismissed his petition and amended petition, disposing of his proceedings under Section 75 (R. 8 and 9).

On September 11, 1935, the sale was confirmed; the Sheriff executed and delivered a deed to petitioner and the same was recorded. Thereafter, a writ of possession was awarded to petitioner and it was placed in possession of the farm by the Sheriff and it has since retained possession.

Respondent then filed a motion in the Common Pleas Court of Madison County to vacate the decree of confirmation, which motion was overruled. Respondent then perfected an appeal to the Court of Appeals of Madison County, Ohio, and that court affirmed the order of the Common Pleas Court, confirming the sale and overruling the motion to vacate the confirmation. No attempt was made by respondent to carry the case to the Supreme Court of Ohio, or to this Court so that the decrees of the State Courts became final.

On September 24, 1935, respondent filed an application for reinstatement of his bankruptcy proceedings (R. 9, 10 and 11), which was granted (R. 11), but no amended petition has been filed or adjudication in bankruptcy entered.

Petitioner then filed its motion for an order of disclaimer of the premises theretofore conveyed to it (R. 12 and 13) and the District Court granted the same, disclaiming any right, title or interest therein (R. 14 to 32, inclusive, and also R. 34).

On appeal, the Circuit Court of Appeals reversed the District Court, finding that the Sheriff's sale was void, as being in violation of the provisions of Section 75 (o) of the Bankruptcy Act, and that the confirmation of the sale by the Common Pleas Court was also void, without regard to the fact that no proceedings were pending in the Bankruptcy Court at the time of such confirmation and in spite of the ruling of the Court of Appeals of Madison County, Ohio, sustaining the lower court (R. 47 to 53, inclusive).

On October 17, 1939, petitioner filed a petition in said United States Circuit Court of Appeals, Sixth Circuit, for a stay of the execution and enforcement of the judgment of said court for a reasonable time to enable petitioner to apply for, and obtain a writ of certiorari from this Court to said Circuit Court of Appeals. On November 14, 1939, said court granted a stay provided petition for writ of certiorari be filed on or before December 14, 1939.

Rulings of the Courts

The District Court held (R. 17 and 18):

1. That the cause passed from the jurisdiction of the District Court with the entry of dismissal on August 26, 1935 (R. 8); that so far as the proceedings in the District Court were concerned, a good title was conveyed to petitioner during the interval when the District Court had no jurisdiction and that the reinstatement in the District Court, under the circumstances, did not and could not bring the property to which title had passed within its jurisdiction.

2. That the District Court was without jurisdiction of the property involved in view of the confirmation of sale by the State Court and delivery of deed when no proceeding was pending in the District Court and when the State Court had sole and exclusive jurisdiction over the parties and the subject-matter.

3. The title to the property involved had passed to petitioner prior to the reinstatement of the cause under the provisions of Section 75 (s) as amended August 28, 1935. Decree was entered sustaining petitioner's motion for order of disclaimer (R. 18).

The Circuit Court of Appeals reversed the District Court and held (R. 48):

1. That the order of the District Court modifying the original restraining order (R. 4) to permit the Sheriff to proceed with the sale of the real estate involved, was void because beyond the jurisdiction of the District Court.

2. The sale itself was void because prohibited by subsections (2) and (6) of Section (o) of Section 75 of the Bankruptcy Act.

3. That the confirmation of the sale by the State Court was void because the sale was void and that the Sheriff's deed to petitioner, under authority of said confirmation, was also void.

4. That the State Court had no power to confirm the sale and its action could be attacked collaterally in the bankruptcy proceeding.

5. That respondent has never been divested of his property rights and that the Bankruptcy Court had exclusive jurisdiction (subsection n), Section 75, at the time the order of disclaimer was entered.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the District Court was without power to enter its order of November 23, 1934 (R. 4) modifying the restraining order issued November 19, 1934 (R. 4).

2. The Circuit Court of Appeals erred in holding that the provisions of Section 75 (o) of the Bankruptcy Act were mandatory and divested the District Court of the authority or discretion exercised by it in modifying the restraining order (R. 4).

3. Said Circuit Court of Appeals erred in holding that respondent had never been divested of his property rights in the real estate involved and that the Bankruptcy Court had exclusive jurisdiction of said property at the time the order of disclaimer was entered.

4. Said Circuit Court erred in reversing the order of the District Court disclaiming the real estate involved.

5. Said Circuit Court of Appeals erred in holding that the confirmation of sale entered by the Common Pleas Court of Madison County, Ohio, and thereafter affirmed by the Court of Appeals of said county, and the deed from the Sheriff were void and subject to collateral attack herein.

6. Said Circuit Court of Appeals erred in attempting to void the decree of the Court of Common Pleas of Madison County, Ohio, affirmed by the Court of Appeals of said county, which decree was entered by said State Court when it had sole and exclusive jurisdiction of the parties and the subject-matter involved.

Summary of Argument.

I

The order of the District Court modifying the restraining order and permitting the sale, but restraining confirmation, transfer of title and delivery of deed was within the power and discretion of the District Court (R. 4).

II.

The order of the District Court modifying the restraining order and permitting the sale, not excepted to and not appealed from, became res adjudicata and binding upon the respondent.

III.

Abandonment by respondent of proceedings under Section 75 (a) to (r) of the Bankruptcy Act by the filing of his amended petition under original Section 75 (s), followed by a dismissal of the entire proceedings under Section 75, upon the application of respondent, rendered such proceedings nugatory, constituted a waiver of all irregularities which might have occurred while said proceedings were pending and estopped and precluded the respondent from thereafter objecting to such irregularities.

IV.

The so-called sale in the State Court did not change the legal status of the debtor or his property as he still retained the identical right of redemption secured to him by the provision of Ohio G. C. Section 11690 up to the time of confirmation by the State Court, which occurred after the Bankruptcy Court had lost jurisdiction by the dismissal of the bankruptcy proceedings.

V.

The State Court had exclusive jurisdiction of the parties and subject matter when the decree of confirmation was entered and its decree cannot be collaterally attacked in this proceedings.

VI.

The case of Hoyd v. The Citizens Bank of Albany Company, 89 F. (2d) 105, decided by the Circuit Court of Appeals, Sixth Circuit, March 12, 1937, and relied on by said court in its opinion in the instant case (R. 48), is clearly distinguishable upon its facts.

Argument.

I.

The order of the District Court modifying the restraining order and permitting the sale, but restraining confirmation, transfer of title and delivery of deed was within the power and discretion of the District Court (R. 4).

The modification of the restraining order so as to permit the sale was within the discretion of the District Court by virtue of the last sentence of Section 75 (e) of the Bankruptcy Act, reading as follows:

> "After the filing of the petition and prior to the confirmation or other disposition of the composition or extension proposal by the Court, the Court shall exercise such control over the property of the farmer as the Court deems in the best interests of the farmer and his creditors."

The sale had been advertised by the Sheriff prior to the filing of the petition and the order modifying the restraining order and permitting the sale was entered by the court after the filing of the petition and prior to the confirmation

or other disposition of the composition or extension proposal by the court and to prevent additional costs. It was entered because the court deemed it to the best interests of the farmer and his creditors.

This court has recognized and established the right of the court to exercise judicial discretion in the administration and enforcement of the provisions of Section 75 of the Bankruptcy Act.

In *Adair* v. *Bank of Amer. Nat. Trust & Savings Ass'n.*, 303 U. S. 350, 355, 356 and 357 there was under consideration the interpretation and application of the provisions of Section 75 (e), (n) and (o) of the Bankruptcy Act. On page 355 of the opinion this Court said:

> "To accomplish its purpose, section 75 provides that the filing of a petition shall effect a stay. Such a stay *under judicial discretion* as to enforcement of claims does not take property without due process and is constitutional. * * * In order to operate and protect the property during the stay, and pending confirmation or other disposition of the composition or extension proposal, the statute provides in subsections (e) and (n) for the exercise by the court of 'such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors.' These provisions look toward the maintenance of the farm as a going concern, and afford clear authority, *in a proper case*, for the continuance of the operations of the farm after the filing of a petition under section 75 of the Bankruptcy Act." (Italics ours.)

Section 75 (n) of the Bankruptcy Act, referred to in the above case and in effect in November, 1934, when the Court modified the restraining order to permit the sale in the instant case, reads as follows:

> "The filing of a petition pleading for relief under this section, shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the

court. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the court, the title, powers, and duties of its officers, the duties of the farmer and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition or answer was filed."

In a case of voluntary bankruptcy, the Court would have the right to modify the restraining order and under the provisions of the foregoing statute, it likewise would have such power.

On the 28th day of August, 1935, Congress amended the above section to remove doubt as to its meaning. The amended section, in part, provides:

"In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section. * * *"

From the foregoing it would appear that Congress, even in the amended section did not contemplate the restraining of the sale, but merely the extension of the period of redemption or the withholding of a confirmation of sale, for a period necessary for the purpose of carrying out the provisions of the section.

In the case of *Wright* v. *Union Central Life Ins. Co.*, 304 U. S. 502, 515, this Court had under consideration the

interpretation and application of the provisions of Section 75 (n), as amended August 28, 1935, and on page 515 of the opinion states:

> "Section 75 (n), 11 U. S. C. A. Sec. 203 (n) provides that 'the period of redemption shall be extended * * * for the period necessary for the purpose of carrying out the provisions of this section.' *The stay may be approved for the period during which the debtor seeks to effect a composition,* and, as contemplated by section 75 (s), for a moratorium period not exceeding three years, during which the court's equitable supervision over the land continues, and a reasonable rental is required. That such an extension is consonant with the due process clause of the Fifth Amendment is indicated by our decision in Home Bldg. & Loan Ass'n. *v.* Blaisdell, 290 U. S. 398 * * * where we held that neither the due process clause of the Fourteenth Amendment nor the contracts clause were violated by an emergency state statute authorizing extension of the period of redemption from foreclosure sales, for a just and equitable period not exceeding two years, conditioned on payment by the mortgagor of a reasonable rental, *as directed by the court.*" (Italics ours.)

The foregoing quotation certainly means that the stay is not mandatory but *may* be approved for the period during which the debtor seeks to effect the composition. In other words, the court may grant or deny such stay, in its discretion, which denial is subject to review, if proper steps are taken to perfect an appeal, but not otherwise.

In *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U. S. 440, this Court recognized the general equitable jurisdiction of the court in the handling of the property of a debtor under Section 75, even to a dismissal and termination of the proceedings at the outset, although such power is not expressly provided in the Act.

II.

The order of the District Court modifying the restraining order and permitting the sale, not excepted to and not appealed from, became res adjudicata and binding upon the respondent.

The Circuit Court of Appeals has held that the order modifying the restraining order and permitting the sale was void, as not being within the discretion of the District Court. It must be conceded that the District Court had jurisdiction of the parties and subject-matter at the time such order was entered by virtue of the express provisions of the Act. The Respondent did not object to the order and prosecuted no appeal therefrom. It is therefore the contention of the petitioner that the order in question became *res adjudicata* and binding upon the parties upon the expiration of the time for appeal.

In the case of *McWilliams* v. *Blackard*, 96 Fed. (2d) 43, decided by the Circuit Court of Appeals for the Eighth Circuit on April 28, 1938, proceedings under Section 75 had been dismissed on the grounds of the unconstitutionality of Section 75 (s) as amended. No appeal was taken from the order of dismissal and subsequently this Court held that Section 75 (s), as amended, was constitutional. Thereafter, the District Court reinstated the debtor's petition and upon appeal the Circuit Court of Appeals held that the order of dismissal was *res adjudicata* and whether right or wrong, was final and binding upon the parties. The Court, in the course of the opinion makes the following comments:

> "Since no action was taken by the debtor to secure a reversal of the decision of this court, the judgment, whether right or wrong, became final and binding upon him.

"'Whatever may be the nature of a question presented for judicial determination,—whether depending on Federal, general, or local law,—if it be embraced by the issues made, its determination by a court having jurisdiction of the parties and of the subject-matter binds the parties and their privies so long as the judgment remains unmodified or unreversed. . . .

"This court has held that: 'It is not material to this estoppel that the judgment which works it may have been erroneous; that the court may have been mistaken in the facts, may have misconceived the law, or may have disregarded the public policy of the nation when it rendered it. It is sufficient that it had jurisdiction of the subject-matter of the action and of the parties to it, and in this state of the case the established rule of law is that its judgment upon the merits in an action between the same parties, or between those in privity with them, upon the same claim or demand, is conclusive, whether right or wrong, not only as to every matter offered, but as to every admissible matter which might have been offered, to sustain or defeat the claim presented.'"

Similar facts are involved in the case of *Minneman* v. *Federal Land Bank of Louisville*, 105 Fed. (2d) 363. There, proceedings under Section 75 (s), as amended, had been dismissed because of the alleged unconstitutionality of the section in question. No appeal was taken from the order of dismissal and the time for appeal had passed. Appellants relied upon the amendment of March 4, 1938, Section 75 (s) (5), directing the reinstatement of cases which had been dismissed on the erroneous assumption that sub-section (s) was unconstitutional. The Court, however, stated:

"Here no appeals were taken from the orders admittedly erroneous, nor were applications made to the District Court for their reconsideration in accordance with the holding of the Supreme Court in Wayne United

> Gas Co. *v.* Owens-Illinois Glass Co., 300 U. S. 131, 57 S. Ct. 382, 81 L. Ed. 557. They therefore became final and binding; and the purchasers at the various foreclosure sales became entitled to the issuance of sheriff's deeds upon the expiration of the periods of redemption, the running of which was stayed only so long as the proceedings under section 75 remained pending. When the amendment of March 4, 1938, became effective, there were no proceedings then pending to be reinstated for the reason that the periods of redemption had expired and deeds had issued to the properties vesting title to them in other parties, which titles could not be divested by the subsequent legislation. * * *"

The above cases are both probably in conflict with the decision of the Circuit Court of Appeals in the instant case. In these cases the courts had erroneously dismissed the proceedings. There was nothing in the Act authorizing such dismissals, and it might be said that it was not within the jurisdiction or power of the court to enter such dismissals, in view of the ultimate holding of the Supreme Court that the Act was constitutional, yet the court there had jurisdiction over the parties and the subject-matter by the express terms of the Act and its decrees were binding until modified or reversed. The same is true in the instant case. The District Court had jurisdiction of the parties and the subject-matter by the express terms of the Act and even if the order was erroneously entered, it was binding upon the parties until modified or reversed. No application for modification was ever filed, nor objection made to the order and no appeal taken, so that the order in due course became *res adjudicata*.

III.

Abandonment by respondent of proceedings under Section 75 (a) to (r) of the Bankruptcy Act by the filing of his amended petition under original Section 75 (s), followed by a dismissal of the entire proceedings under Section 75, upon the application of respondent, rendered such proceedings nugatory, constituted a waiver of all irregularities which might have occurred while said proceedings were pending and estopped and precluded the respondent from thereafter objecting to such irregularities.

The order modifying the restraining order to permit the sale was entered by the court during the proceedings under Section 75 (a) to (r) of the Bankruptcy Act. The Circuit Court of Appeals, in its opinion (R. 48), totally ignored the fact that such proceedings had come to naught and that the debtor had thereafter filed his amended petition under original Section 75 (s). It is the contention of petitioner that Respondent thereby abandoned the former proceedings and that any irregularities therein were waived by Respondent and the situation was the same as if such proceedings had never been instituted.

The Circuit Court of Appeals also ignored the fact that the entire proceedings were dismissed by the Court on August 26, 1939, upon application of the debtor and that in the order of dismissal, the Court provided that:

> "* * * this matter be and the same is hereby fully terminated."

If this Court should find that the order modifying the restraining order was not *res adjudicata*, it then must find that all the proceedings under Section 75 of the Bankruptcy Act became nugatory upon the dismissal of the proceedings.

In the case of *Harrison* v. *Remington Paper Co.*, 140 F. 385, 399, 3 L. R. A. (N. S.) 954, the law in this regard is stated as follows:

> "* * * Rulings and decisions in the course of an action which is finally dismissed without prejudice adjudge nothing, because the final judgment by its terms is that nothing has been adjudicated, and this fact is the only *res adjudicata*. Such a judgment determines that the parties are left as free to litigate every issue in the action dismissed as they would have been if it had never been commenced."

In *Viviano* v. *Ferguson* (Mo. App.) 39 S. W. (2d) 568, 569, the court said:

> "* * * These suits were voluntarily dismissed by plaintiffs prior to judgment without prejudice; and the dismissal without prejudice inured to the benefit, not only of plaintiffs, but also of defendants as well. In other words, the only adjudication by force of the order of dismissal was that nothing had been adjudged, and therefore the parties were left free to litigate the issues as though the suits had never been filed."

In *Piukkula* v. *Pillsbury Astoria Flouring Mills Co.*, (Oregon Supreme Court) 42 P. (2d) 921, 99 A. L. R. 244, followed by 258, the Court said:

> "* * * In other words, since all of the orders entered in that action, with the exception of the order of dismissal, were rendered nugatory when the action was dismissed, nothing remains which supports the plaintiffs' contention that the defendant waived Piukkula's failure to file his action timely."

Your petitioner therefore maintains that the voluntary dismissal by Respondent of the entire proceedings under Section 75 rendered such proceedings nugatory and that the conditions were then the same as if such proceedings had never been instituted.

IV.

The so-called sale in the State Court did not change the legal status of the debtor or his property as he still retained the identical right of redemption secured to him by the provisions of Ohio G. C. Section 11690 up to the time of confirmation by the State Court, which occurred after the Bankruptcy Court had lost jurisdiction by the dismissal of the bankruptcy proceedings.

A decree of foreclosure had been entered, an order of sale issued and advertising completed before the debtor filed his petition. The only authority granted by the order modifying the restraining order was for the Sheriff to conduct the sale, which amounted to no more than receiving bids, all authority to pass title being expressly withheld. No change was authorized or permitted by the court in the status of the property. At the time of filing his petition, respondent had only one property right and that was the right of redemption, secured to him by the statutes of the State of Ohio, and this right of redemption continued in full force and effect up to the confirmation of the sale.

Ohio General Code Section 11690 provides as follows:

> "In sales of real estate on execution or order of sale, at any time before the confirmation thereof, the debtor may redeem it from sale by depositing in the hands of the clerk of the court to which such execution or order is returnable, the amount of the judgment or judgments or decree upon which such lands were sold, with all costs, including poundage, and interest at the rate of eight per cent per annum on the purchase money from the date of sale to the time of such deposit; or, if it is made in vacation, to the first day of the next term, except where the judgment creditor is the purchaser, the interest at such rate on the excess above his claim. The court thereupon shall make an order setting aside such sale, and apply the

deposit to the payment of such judgment or judgments or decree and costs, and award such interest to the purchaser, who shall receive from the officer making the sale the purchase money paid by him, and the interest from the clerk. Nothing in this section shall take away the power of the court to set aside such sale for any reason for which it might have been set aside prior to the enactment hereof (R. S., Section 5398a)."

The foregoing section is construed in 24 Ohio Jur., Section 105, at page 79 as follows:

> "The purchaser obtains no vested right until after the sale is confirmed, and, if the confirmation is refused, the rights of the purchaser fall to the ground. A bid, though the highest, being but an offer to purchase, subject to the approval or disapproval of the court, the accepted bidder whose bid has been returned to the court as the best offer acquires by the mere acceptance of his bid no independent right to have his purchase completed, but is merely a preferred proposer until confirmation of the sale by the court. By acceptance of his bid, and the subsequent confirmation of the same by the court, the bidder becomes the purchaser in the full sense of the term, and the substantial owner of the property sold, with the right of possession, though his right may not be asserted against the former owner until the due execution of a deed."

The modification granted by the court did no more than authorize the Sheriff to accept bids, while at the same time holding the debtor and his property within the jurisdiction of the court and maintaining the *status quo*. No injury or prejudice to the debtor resulted and nothing happened to change the relationship between the debtor and his property until after August 26, 1935, when the debtor, by his own act, removed both himself and his property from the jurisdiction of the court. It was the order of dismissal, not the order of modification which permitted the petitioner to

proceed with its foreclosure. The only property right which respondent had after the decree of foreclosure was the right to redeem and this right of redemption continued until the confirmation of the sale. After the dismissal of the bankruptcy proceedings, the State Court had sole and exclusive jurisdiction of the debtor and his property and its decree of confirmation then entered, cut off this right of redemption.

V.

The State Court had exclusive jurisdiction of the parties and subject matter when the decree of confirmation was entered and its decree cannot be collaterally attacked in this proceeding.

The State Court had original and exclusive jurisdiction of the parties and the subject-matter until the filing of the bankruptcy proceedings, at which time, such jurisdiction was superseded by that of the Bankruptcy Court. The judgment and order of foreclosure was entered before the institution of the bankruptcy proceedings so that it was entered while the State Court had exclusive jurisdiction. The judgment of confirmation was entered after the dismissal of the bankruptcy proceedings and when the State Court again had exclusive jurisdiction of the parties and of the subject-matter so that its determination that the foreclosure proceedings had been regular, even though in error, must be considered as *res adjudicata* and binding in any other court, or in any other litigation involving the same parties and the same subject-matter. This is especially true where the interpretation and application of local law is involved, as in the instant case. Here, the statutes of the State of Ohio providing for the foreclosure of mortgages are controlling and it is the primary duty of the State Court to construe and apply such statutes. When it has done so, in a case in which it has jurisdiction of the

parties and the subject-matter, such construction is binding unless directly attacked by appeal in the same proceeding. The omission of any step required by the statutes of Ohio would not and could not avoid a sale if a court in which the proceedings are pending finds that all steps have been taken regularly and its decree remains unmodified or unreversed. In other words, if the property had not been properly advertised, or the Sheriff had not actually held public sale, or, if the property had not been properly appraised, or appraised at all, still the finding of the court that the steps had been properly taken, followed by a confirmation of sale, would be conclusive upon all parties to the suit and the order would become *res adjudicata* upon the lapse of the time given for an appeal. When such order has become *res adjudicata* it cannot be questioned in any other court or in any other proceeding.

The principle stated has been recognized by this Court in *Robertson* v. *Howard*, 229 U. S. 254, 264, 33 S. Ct. 854, 57 L. Ed. 1174, where a referee in bankruptcy had confirmed a trustee's sale. An action was started in the State Court questioning the validity of the sale. The Supreme Court of Kansas held the sale to be void due to irregularities prior to the sale, which included an alleged lack of appraisement and error in the description of the property. This Court, speaking through its Chief Justice White said near the end of the opinion:

> "As regards the alleged lack of an appraisement and error in the description of the property covered by the certificate, contained in the published notice, we think they must in this collateral proceeding be deemed as mere irregularities, and that the order of confirmation, made by the referee, was sufficient to validate the sale under the discretionary power given to the referee by Sec. 70b of the bankruptcy act. Thompson *v.* Tolme, 2 Pet. 157, L. Ed. 381.

"The Supreme Court of Kansas erred in deciding that the plaintiffs in error acquired no right or interest to the land in controversy under the sale made by the Court of Bankruptcy for the Southern District of Illinois; and its judgment must therefore be reversed and the case be remanded for further proceedings not inconsistent with this opinion."

Thompson v. *Tolmie*, 2 Pet. 157, is an early case on this subject. There an independent action in ejectment was brought to recover real estate theretofore sold in partition, in the Circuit Court of the District of Columbia.

This Court, on page 163 held:

"* * * These proceedings were brought before the court below collaterally, and are by no means subject to all the exceptions which might be taken on a direct appeal. They may well be considered judicial proceedings; they were commenced in a court of justice, carried on under the supervising power of the court, and to receive its final ratification. The general and well-settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears upon the face of them that the subject-matter was within the jurisdiction of the court, they are voidable only. The errors and irregularities, if any exist, are to be corrected by some direct proceeding, either before the same court, to set them aside, or in an appellate court. * * *"

Again on page 169:

"When a court has jurisdiction, it has a right to decide every question that occurs in the cause; and whether its decisions be correct or not, its judgment, until reversed, is regarded as binding in every other court."

To the same effect is the case of *Hall* v. *Law*, 102 U. S. 461.

The case of *Briscoe* v. *Rudolph*, 221 U. S. 547 involved the question whether a judgment of the Supreme Court of

the District of Columbia, confirming a special assessment for benefits resulting from a street assessment, could be attacked collaterally because that court upon an objection challenging the assessment as excessive, did not call a second jury as provided for by statute. This Court answered in the negative, holding that this was at most an error which could only be available in appropriate proceedings in error. Near the end of the opinion the court said:

> "* * * But the court was possessed of jurisdiction over the parties and over the subject-matter. If the owner assessed did not in some way take steps to set aside the first verdict, its confirmation would necessarily be final. If he was denied a second jury when entitled to it, the court would fall into error; but the order confirming the assessment would not be void. There is no possible ground for upholding the present collateral attack if the order was avoidable only."

In *Grubb* v. *Public Utilities Commission of Ohio, et al.*, 281 U. S. 470, 50 Sup. Ct. Reporter, 374, the question of estoppel by a judgment arose. There this Court held that the judgment of the State Supreme Court sustaining the Public Utilities Commission in prohibiting operation of a bus line over an interstate bridge was *res adjudicata* in a suit in Federal Court to enjoin enforcement of the Commission's order. A further claim was made that the State Courts did not have jurisdiction to review orders of the Commission relative to interstate commerce. This Court, at page 477 of the opinion stated:

> "* * * The power of the State Court in these particulars are questions of local law only. That court resolved them against the present contentions, for it both reviewed and affirmed the order. * * * Plainly its solution of these questions of local law must be accepted as controlling in this Court, as they were in the District Court. * * *"

In the instant case, the question involved was the validity and legality of proceedings in foreclosure taken under the provisions of the statutes of the State of Ohio. The State Court passed upon these proceedings and held that they were valid. Such decision of the questions of local law must be accepted as controlling in a court subsequently acquiring jurisdiction.

In *Southern Pacific Ry. Co.* v. *United States*, 168 U. S. 1, the court had under consideration the same question and stated:

> "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties, or their privies, and, even if the second suit is for a different cause of action, the right, question, or fact once so determined, must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue, and actually determined by them."

The foregoing is quoted and approved in *Mitchell* v. *First National Bank of Chicago*, 180 U. S. 477.

The case of *Pepper* v. *Litton*, decided by this Court December 4, 1939, has been considered by counsel in the preparation of this brief. We believe that the court in that case has adhered to the principles of *res adjudicata* enunciated

in the foregoing decisions, although the ultimate determination of the court turned upon the broad equitable principles not herein involved.

In *Prebyl. v. Prudential Ins. Co. of America*, 98 F. (2d) 199, a situation somewhat similar to the instant case was involved. The plaintiff was a voluntary bankrupt, and an order was entered by the Bankruptcy Court authorizing the defendant-mortgagee to foreclose its mortgage in the State Court, which was done. Mortgagor filed exceptions to the confirmation of sale in the State Court, which were overruled and upon appeal to the Supreme Court of Nebraska, the lower court was sustained. Plaintiff seeks a review in the Federal Court. The court, in its opinion on page 200 says:

> "This exact issue, based upon the identical facts in a suit between the same parties, was directly adjudicated and determined by the Supreme Court of Nebraska adversely to the claim now urged by plaintiff. An issue thus once tried on its merits, culminating in a final judgment, precludes a retrial of the same issue between the same parties, whatever the form of action may be. (Citing cases) * * *".

In *Montgomery v. Equitable Life Assur. Soc. of the United States*, 83 F. (2d) 758 (Seventh Circuit), on page 762 of the opinion the Court said:

> "It is well-settled in Illinois that a decree of a court of general jurisdiction cannot be impeached for fraud or for errors of law where the court had jurisdiction of the parties and the subject matter. * * * In Weberpals *v.* Jenny, supra, the court said, 'Granting that the court had jurisdiction, it is altogether immaterial, when the decree is collaterally called in question, how grossly irregular and manifestly erroneous the proceedings may have been. The decree cannot be regarded as a nullity, and cannot therefore be col-

laterally impeached. Such a decree is binding on the parties, and on every other court, unless reversed or annulled in the direct proceeding. * * * "

In the case of, *In re 7000 South Shore Drive Bldg. Corporation*, 86 F. (2d) 499 (Seventh Circuit), the State Court in a foreclosure proceedings had authorized certain expenditures by the receiver. Subsequently, proceedings were instituted under Section 77 (b) of the Bankruptcy Act. The District Court thereafter disallowed the expenditures and was reversed by the Circuit Court of Appeals, which on pages 501, 502 of its opinion said:

"Here the State court had jurisdiction of the parties and the subject matter. The latter included foreclosure of the trust deed and incidentally the administration of the receivership, in aid of the foreclosure. The custody of and jurisdiction over the res, the real estate and the rents and profits thereof, were lodged in the court. It was its duty, through its receiver, to conserve the res of the estate, to preserve it, and faithfully to administer it, pendente lite, for the benefit of the parties. The order of the State court directing the receiver to make the payment complained may have been erroneous. Whether the terms of the trust deed justified the order, whether other equitable reasons why it should be entered existed, we are not privileged to inquire; the subject matter and the parties being before the court and the issue submitted on proper pleadings, we may not inquire as to the wisdom of the order. * * * "

In *Rishol* v. *McPherson County*, 34 F. (2d) 250, the Court stated on page 252 of the opinion:

"* * * It is settled law that, where a second action involves the same claim or demand, the judgment is conclusive as to all questions that were or might have been determined. * * * "

To the same effect is the case of *Jack* v. *Hood*, 39 F. (2d) 594, in which case the Court on page 595 of the opinion said:

> "Moreover, the decree of the State court, in a controversy between the same parties, or their privies in title, over the same land, is conclusive, not only over matters litigated, but all matters that might have been litigated; * * *"

In *Gordon* v. *Ware National Bank*, 132 Fed. 444, 67 L. R. A. 550, Judge Sanborn of the Eighth Circuit, in speaking of estoppel by a judgment, made the following comment:

> "It is not material to this estoppel that the judgment which works it may have been erroneous; that the court may have been mistaken in the facts, may have misconceived the law, or may have disregarded the public policy of the nation when it rendered it. It is sufficient that it [illegible] jurisdiction of the subject-matter of the action and of the parties to it, and in this state of the case the established rule of law is that its judgment upon the merits in an action between the same parties, or between those in privity with them, upon the same claim or demand, is conclusive, whether right or wrong, not only as to every matter offered, but as to every admissible matter which might have been offered, to sustain or defeat the claim presented. Cromwell *v.* Sac County, 94 U. S. 351, 352, 24 L. ed. 195, 197. * * *"

The rule of law applicable is stated by the Supreme Court of Ohio in the case of *Wright* v. *Schick*, 134 O. S. 193 in the following language:

> " 'Briefly stated, the doctrine of *res judicata* is that an existing final judgment or decree, rendered upon the merits, and without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties or their privies, in all other actions or suits in the same or

any other judicial tribunal of concurrent jurisdiction. * * *" 23 Ohio Jurisprudence, 961, Section 730. See also, 34 Corpus Juris, 742, Section 1154.

The Circuit Court of Appeals, in its opinion (R. 52) cites and quotes from several early cases decided by this Court, which it claims support its decision.

Counsel have carefully read the opinions in these cases and with the exception of *Thompson* v. *Tolmie*, 2 Pet. 157, *supra*, all were cases where the court, whose order was sought to be collaterally attacked, had no jurisdiction of the parties or the subject-matter at the time the order in question was entered. These are clearly distinguishable from cases where the court had jurisdiction of both the parties and the subject-matter at the time the order was entered, as in the instant case.

It therefore must be the inevitable conclusion that the State courts had sole and exclusive jurisdiction of the parties and the subject-matter after the voluntary dismissal of the bankruptcy proceeding and that its findings and orders then entered are not now subject to collateral attack in a bankruptcy proceeding thereafter reinstated.

The Respondent had the right to seek review in the Supreme Court of Ohio, and then in this court where the merits of the entire controversy could have been determined in a direct proceeding. Respondent did not see fit to do this, so that the orders of the State courts are now *res adjudicata*.

VI.

The case of Hoyd v. The Citizens Bank of Albany Company, 89 F. (2d) 105, decided by the Circuit Court of Appeals, Sixth Circuit, March 12, 1937, and relied on by said court in its opinion in the instant case (R. 48), is clearly distinguishable upon its facts.

There are several substantial and material differences between the case of *Hoyd* v. *The Citizens Bank of Albany Company*, 89 F. (2d) 105, and the instant case, which render them clearly distinguishable.

These differenses are as follows:

1. In the *Hoyd* case the District Court completely dissolved the restraining order permitting the State court to proceed with the confirmation, which terminated the property right of the farmer debtor, while in the instant case the District Court only modified the restraining order by permitting the sheriff to offer the property for sale, but the order specifically enjoined the confirmation thereby retaining to the debtor his right of redemption.

2. In the *Hoyd* case the debtor prosecuted error on the order dissolving the injunction, while in the instant case the debtor did not prosecute error to the order modifying the injunction.

3. In the *Hoyd* case the order of confirmation was entered by the State court while the bankruptcy proceedings were still pending in the Federal court, while in the instant case the order of confirmation was not entered until after the entire proceedings under Section 75 were dismissed and terminated by the Federal court on application of the debtor himself (R. 8) and at the time of such termination the debtor retained all of his right of redemption.

4. In the *Hoyd* case the right of redemption of the debtor was divested by the State court while the Federal court had sole and exclusive jurisdiction of the debtor and the property. In the instant case the right of redemption of the debtor was divested by the State court while it had sole and exclusive jurisdiction of the debtor and his property, so that when the proceedings were subsequently reinstated under Section 75 (s), as amended August 28, 1935, (R. 13) he had no further property right in the premises of any nature or description.

Conclusion

In the light of the foregoing, we respectfully submit that certiorari should be granted.

Respectfully submitted,

A. G. Masters,
Detroit, Michigan,
Counsel for Petitioner.
Ralph G. Martin,
Columbus, Ohio,
Of Counsel for Petitioner.

APPENDIX

"EXHIBIT A"

IN THE COURT OF APPEALS OF MADISON COUNTY, OHIO

No. 130

UNION JOINT STOCK LAND BANK OF DETROIT, a corporation, Plaintiff-Appellee,

vs.

CARL BYERLY, Defendant-Appellant.

Decision

(Rendered March 4, 1938)

BARNES, *P. J.*

This cause was submitted orally at the October Term, 1937, on a motion to postpone determination pending a decision of the United States District Court of Appeals on what was claimed to be a controlling question. Counsel for appellee vigorously resisted the motion, making the contention that the case pending in the United States District Court was not controlling. Under this situation we announced we would take the case both on the motion and the merits, thinking this plan would expedite the final determination. Leave was taken to file briefs and thereafter the file was to be placed in our hands. The file did not reach us until about ten days ago.

Without further comment we shall overrule the application for postponement. Our reasons will be apparent on the determination of the issues on the merits.

The issuable questions have the appearance of being involved but readily unfold themselves when we understand the nature of the action and the chronological order in which various steps were taken in the State and United States Courts.

On October 19, 1933, plaintiff Stock Land Bank filed its petition against the defendant Byerly praying personal judgment on promissory note for $12,000.00 and interest and foreclosure of mortgage given to secure the note.

Summons was issued and the cause proceeded to judgment, order of sale, appraisement, advertisement and re-

turn of proof of publication on November 16, 1934, the sale to be held November 24, 1934.

On November 19, 1934, the defendant Byerly filed in the United States District Court at Columbus, Ohio, his farmer debtor petition under Section 75 of the Bankruptcy Act. On the same day the United States District Court issued an injunction against the Sheriff of Madison County from proceeding with the sale. On November 23, 1934 the injunctive order of November 19 was modified so as to permit the Sheriff to proceed with his sale on the day mentioned, but enjoining further proceedings, particularly confirmation of sale and transfer of any title or deed thereunder. On the day designated in the advertisement the sheriff offered the premises, and there being no bidders other than the Land Bank, the farm was struck off to them at their bid, which was two-thirds or more of the appraisement.

Other than the Sheriff's return no further proceedings were taken in the State Court for almost one year thereafter. In December, 1934 the farmer debtor's petition was referred to a conciliation commission. Thereafter a creditors' meeting was held and the debtor's offer of composition was rejected. This fact was reported by the commissioner to the Federal Court on February 11, 1935. On the same day the petitioner by leave of court amended his petition under Section *S* and was adjudged a bankrupt. On May 27, 1935, the Supreme Court of the United States in the case of Louisville, etc., *v.* Radford, 256 U. S. 170, held said Section *S* to be unconstitutional.

On August 26, 1935 the farmer debtor's petition in the U. S. District Court was dismissed as per the following entry:

> "This day this matter came on to be heard upon the application of the debtor herein for an order dismissing this proceedings, and it appearing to the court that the debtor heretofore filed his petition under Section 75 of the Bankruptcy Act as amended, praying for composition or extension; that upon said petition reference was duly had to and a meeting of creditors was held before Silas G. Williams, conciliation com-

missioner for Madison County, Ohio, and that debtor's offer of composition or extension was refused by a majority of creditors, both in number and amount, that the said commissioner has filed his return showing such refusal and that thereafter the debtor amended his petition herein and proceeding under sub-Section S of Section 75 of said Bankruptcy Act, and that the said section was found to be unconstitutional by the United States Supreme Court.

"It is therefore ordered that the debtor's petition and amended petition be and the same are hereby dismissed and that this matter be and the same is hereby fully terminated."

On August 28, 1935, through an action of Congress, there became effective a new sub-section S of Section 75 of the Bankruptcy Act. On September 10, 1935, there was presented to the Common Pleas Court application for confirmation of Sheriff's sale, accompanied by evidence of the dismissal of farmer debtor's petition in the United States District Court. The sale was confirmed and deed ordered as evidenced by journalized entry. The deed was filed for record in the Recorder's Office, Madison County on September 11, 1935.

On September 23, 1935 counsel for the farmer debtor filed motion in the United States District Court for reinstatement of cause and on May 21, 1936 the motion was sustained. On September 24, 1935 the defendant Byerly filed motion in the Common Pleas Court of Madison County, Ohio, asking that the sale, confirmation, etc., be set aside. On May 8, 1936 the Land Bank filed in the United States District Court its motion praying disclaimer, which motion was sustained on October 14, 1936.

On November 4, 1936 the defendant Byerly's motion of September 24 was overruled. On November 14, 1936 a motion for new trial in State Court was overruled. The ground of defendant's motion to set aside the sale and confirmation of sale, etc., was predicated on alleged fraud. The Specification of Fraud was based on the claim that the plaintiff Land Bank, through its representative and/or attorneys had induced the dismissal of the defendant's pro-

ceeding in the United States District Court under a promise that confirmation of sale in Common Pleas Court would not be requested, etc. The Common Pleas Court heard the evidence and found against the defendant on its claim of fraudulent conduct.

We have examined the record very carefully and have no difficulty in agreeing with the Trial Court's finding.

Counsel for defendant Byerly raises a further question that the United States District Court exceeded its authority in modifying the order of injunction whereby the Sheriff of Madison County was permitted to hold his public auction sale and make his return of premises sold to the plaintiff. The claim is further made that injunction was not necessary for the reason that Section 75 (n and o) are self-executing and had the effect of staying all proceedings in the State Court the instant the farmer debtor's petition was filed in the United States District Court. In support of this theory of law the following Federal cases are cited: In re Bradford, 7 Fed. 665; In re O'Brien, 9 Fed. 892. However strongly we might be inclined to follow this theory of the law, we are confronted with the fact that we have no jurisdiction to review judgments of the Federal District Court.

A further claim is made that the defendant's motion for reinstatement of his cause having been sustained, such order would vitiate the action of the Common Pleas Court in confirming the sale.

It is our judgment that the action of plaintiff in dismissing his cause in the Federal Court compels us to resolve all questions against him. The Trial Court so found and the opinion of the United States District Court attached to the brief leads to the same conclusion.

The judgment of the Trial Court will be affirmed and cause remanded for further proceedings according to law.

Costs will be adjudged against the appellant.

(Hornbeck and Geiger, *JJ.*, concurring).

Appearances: Ralph G. Martin, Columbus, Ohio, Martin P. Carey, Plain City, Ohio, For Plaintiff-Appellee; Elmer McClain, Lima, Ohio, For Defendant-Appellant.

"EXHIBIT B"

IN THE COURT OF APPEALS OF MADISON COUNTY, OHIO

No. 130

THE UNION JOINT STOCK LAND BANK OF DETROIT, a corporation, Plaintiff-Appellee,

vs.

CARL BYERLY, Defendant-Appellant

Decision

Rendered March 24, 1938

By the Court:

The above-entitled cause is now being determined on appellant's application for rehearing.

The three page memorandum accompanying the application in reality is a criticism of the court's views, rather than new questions, new authorities or omitted issues, which are generally understood to be the office of an application for rehearing.

The complaint that the date is incorrectly stated is of no more substance than an argument that we failed to cross our t's and dot our i's. The fact remains, regardless of the date, that the appellant's dismissal of his action in the United States Court was prior thereto. The matters complained of by counsel are purely historical and in the end our judgment was founded upon plaintiff's dismissal of his cause in the Federal Court.

The application for rehearing will be overruled.

(BARNES, *P. J.*, HORNBECK and GEIGER, *JJ.*, concurring.)

Appearances: RALPH G. MARTIN, Columbus, Ohio, MARTIN P. CAREY, Plain City Ohio, for Plaintiff-Appellee; ELMER MCCLAIN, Lima Ohio, for Defendant-Appellant.